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Supreme Court of the United States

OCTOBER TERM, 1970

No. 71-302

ANNIE NELL RATLIFF and HENRY RATLIFF,
PETITIONERS,

versus

COOPER LABORATORIES, INC., RESPONDENT

No. _____

ALICE W. NICHOLS, PETITIONER,

versus

STERLING DRUG COMPANY, INC., A CORPORATION,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioners pray that a *Writ of Certiorari* issue to review the decision and judgment of the United States Court of appeals for the Fourth Circuit, dated and entered in these cases on June 29, 1971.

OPINIONS BELOW

The opinions of the District Court (App. 16-26) are unreported. The opinion of the Court of Appeals (App. 27-33) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 29, 1971 (App. 27). The jurisdiction of this Court is invoked under the provisions of 28 U. S. C., Section 1254.

QUESTION PRESENTED FOR REVIEW

May the Court of Appeals reverse, on the ground that the requirements of federal Due Process have not been satisfied, an order of the District Judge upholding jurisdiction of the federal court in an *in personam* action brought by a **non-citizen, non-resident** plaintiff of the forum state against a foreign corporation where a **citizen** or **resident** plaintiff of such state would remain jurisdictionally free under the Due Process clause of the Fifth and Fourteenth Amendments of the United States Constitution to maintain the identical cause of action against the identical foreign corporation?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. Constitution, Article III, Section 2.

"The judicial power shall extend to all Cases, in Law and Equity, * * * to Controversies * * * between Citizens of different States * * *."

U. S. Constitution, Article IV, Section 1.

"Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State * * *."

U. S. Constitution, Article IV, Section 2.

> **"The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."**

U. S. Constitution, Amendment IV, Section 1.

" * * * No State shall make or enforce any Law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

U. S. Constitution, Amendment V.

"No person * * * shall be deprived of life, liberty, or property, without due process of law * * *."

28 U. S. C. A. 1391

"(a) A civil action wherein jurisdiction if founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or shall defendants reside, or in which the claim arose."

* * *

"(c) A corporation may be sued in any judicial district in which it is incorporated or **licensed to do business** or is doing business, and such judicial district shall be regarded as the residence of such corporation for service purposes."

28 U. S. C. 1404

"(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

STATEMENT OF CASE

The instant cases, two in number, consolidated by the Court of Appeals on interlocutory appeal from the District Court, are diversity cases which were brought in separate and unconnnected actions against the respondents respectively.

In the action against respondent, Cooper Laboratories, Inc., a Delaware Corporation, the petitioners, residents of Florida, brought suit in the United States District Court for the District of South Carolina to recover damages because of the loss by amputation of both legs of petitioner, Annie Ratliff, allegedly caused by the consumption in Florida of drugs manufactured by respondent.

The record shows that the contacts, ties or relations of this respondent with the state of South Carolina consist of regular, systematic and continuous activities which include solicitation of orders by distribution of literature, promotional material and samples to doctors and customers in the state, providing and sending into the state labels which are required under the health laws of the state to be attached to its drug products sold in the state, advertising in national medical journals having statewide circulation in South Carolina and listing its products in the Physician's Desk Reference used by doctors in the state, resulting in sales being made regularly and a continuous flow of its products in South Carolina, involving during the year 1968 and a part of 1969 approximately 293 invoices from which respondent derived a revenue of approximately $95,000.00, and also from July 1, 1969, through December 31, 1969, involving 152 invoices from which it derived a revenue of approximately $52,000.00. Also, many of its products are sold on credit and from time to time respondent receives returns of its products from its customers in South Carolina.

In the action against respondent, Sterling Drug Company, Inc., a Delaware corporation, the petitioner, Alice W. Nichols, a resident of Indiana, brought suit in the United States District Court for the District of South Carolina to recover damages for partial blindness and serious injuries to her eyes allegedly caused by the consumption in Indiana of drugs manufactured by respondent.

The record shows that this respondent applied and is licensed to do business in South Carolina and has appointed an agent for service of process in South Carolina. Its contacts, ties or relations with South Carolina consist of regular, systematic and continuous activities which include solicitation of orders through five of its employees who live and work throughout the state, resulting in sales being made regularly in South Carolina and a continuous flow of its products into the state, from which it derives substantial revenue.

On the basis of the foregoing facts, the District Judge, in each case, overruled respondent's challenge to the jurisdiction and held that respondent is doing business in South Carolina and therefore amenable to the jurisdiction of the court.

In reaching his conclusion in each case, the District Judge rejected respondent's contention that the non-residency of petitioner required the granting of the motion to dismiss for lack of jurisdiction. He reasoned that to uphold respondent's contention would result in discrimination against non-residents and would thus defeat the most fundamental purpose of the grant of diversity jurisdiction which is to avoid discrimination against non-residents, citing in support of his reasoning the opinion of Judge Haynsworth in *Markham v. City of Newport News,* 292 F (2d) 718 (CA4, 1961) and the opinion of Judge Sobeloff in *Szantay v. Beech Aircraft Corp.,* 349 F. (2d) 60 (CA4, 1964).

The District Judge also rejected the contention of the respondent in each case that the motion should be granted because it would make available to petitioners the six year statute of limitations—the limitation period having run in all other states having any connection with the claim. In so rejecting respondent's contention, the District Judge reasoned that petitioner has the right to select her forum,

as permitted by 28 U. S. C. 1391 (a) and (b), and, having selected South Carolina as the forum for bringing this action, is entitled to retain whatever advantages may flow from the state laws of the forum initially selected, including its conflict of laws rule that the 6 year Statute of Limitations of South Carolina governs, even though the case may be transferred to another forum for convenience of witnesses under 28 U. S. C. A. 1404 (a), citing *Van Dusen v. Barrack,* 376 U. S. 641 (1964).

Upon appeal, the Court of Appeals, notwithstanding that under South Carolina law the issue of jurisdiction is one of fact which should be affirmed on appeal unless unsupported by evidence, *Carolina Boat & Plastics Co. v. Glascoat Distributors, Inc.,* 249 S. C. 49, 152 S. E. (2d) 352 (1967), reached a factual finding that the District Court was without jurisdiction, stating that the contacts, ties or relations of the respondents with South Carolina are insufficient to satisfy the due process clause of the Fourteenth Amendment, and therefore reversed the District Judge. The Court of Appeals reasoned that since neither respondent "maintains an office in South Carolina", nor "warehouses goods in the state," the activities of the respondent corporation, "although possibly sufficient to constitute 'presence,' are nonetheless minimal," notwithstanding the evidence of record that their "contacts, ties or relations" with the state are regular, systematic and continuous.

The Court did not stop there, however. It concluded, by subscribing to the position taken by the First Circuit in *Seymour v. Parke, Davis & Co.,* 423 F. (2d) 584 (1970), that, under the identical facts herein, "If the plaintiff has some attachment to the forum, (i.e, a resident or citizen of the state) or if the defendant has adopted the state as one of its major places of business, we would have no question of the right of the state to subject the defendant to suit for unconnected causes of action." (parenthesis added.) Yet no-

where in its otherwise detailed opinion, in which the Court below stated that its "inquiry is limited to a determination of whether the facts in the instant case fall within the notions of due process", is there any discussion as to why identical business activities of the corporate respondents are sufficiently extensive to satisfy due process in actions where a plaintiff is a **resident** or **citizen** and only minimal and not sufficiently extensive to satisfy the Due Process requirements in identical actions where the plaintiff is a **non-resident, non-citizen** of the forum state. Neither is there any discussion of the propriety for differentiating between a **resident** or **citizen** plaintiff and a **non-resident, non-citizen** plaintiff, nor any rational basis for such differentiation and application of different standards as to each, in determining federal Due Process requirements.

REASONS FOR GRANTING THE WRIT

1. **The decision herein is not in accord with applicable decisions of this Court:** The decision in the Court below is in direct conflict with the holdings by this Court in *International Shoe Co. v. State of Washington,* 326 U. S. 310 (1945) and *Perkins v. Benquet Consolidated Mining Co.,* 342 U. S. 437 (1952) that federal due process does not preclude a federal court in a state from exercising jurisdiction over a foreign corporation in an in personam action brought against it by a non-resident plaintiff on a transitory cause of action which did not arise in the state, where the contacts, ties or relations of the foreign corporation in the state are continuous, regular and systematic.

Under the older standard and more limited notion of amenability as prescribed by *Pennoyer v. Neff,* 95 U. S. 714 (1877) "presence" of a foreign corporation within the state so as to subject it to the jurisdiction of the courts of such state required more than that the corporation have "minimal" contacts with the state. This older and limited

notion of amenability has now been expanded by the decision of this Court in *International Shoe,* regardless of whether a plaintiff is or is not a resident or citizen of the state, to the extent that jurisdiction may be exercised by the courts in a state over a foreign corporation in causes of action which arise in the state where the corporation has minimal contacts with the state, even though it is not physically present in the state and has no property, office or agent in the state; and by the decision in *Perkins v. Benquet,* jurisdiction over a foreign corporation whose contacts, ties or relations with the state are substantial, i.e., continuous, regular and systematic, may be exercised by the courts in such state, even though the cause of action does not arise in the state and the action is brought by a plaintiff who is neither a resident nor citizen of the state.

In other words, as more clearly stated in Volume 4, Wright & Miller, Federal Practice and Procedure, at page 261, "When the claim is based upon an act committed outside the state that has no consequences within the state, the propriety of asserting jurisdiction depends upon whether the corporation has carried on continuous and systematic, although unrelated, activities in the state. If this proves to be the case, it is consonant with fair play and justice to require the corporation to defend the suit," citing *Perkins v. Benquet, supra.*

The rationale of the foregoing decisions of this Court applies with equal force to the instant cases which present the same important question. The action of the District Judge in upholding jurisdiction over the corporate respondents was based not upon a "casual", "single" or "isolated" contact, but upon contacts of the corporations which are substantial, systematic, regular and continuous. "They resulted in a large volume of interstate business, in the course of which appellant (respondents here) received the benefits and protection of the laws of the state, including

the right to resort to the courts for the enforcement of its rights." Moreover, even though a "rational nexus" between the forum state and the cause of action is not a requirement of due process where the "ties, contacts or relations" of the foreign corporation with the state are substantial, regular, continuous and systematic, as the record discloses in the instant cases, there is a "rational nexus" between South Carolina and the causes of action here. The causes of action, although not arising in South Carolina, arose out of activities of the corporations identical to its activities in South Carolina—the solicitation and promotion of orders resulting in the flow of its drug products in South Carolina. Thus, South Carolina has a most important interest in the instant litigation, such as this, which tends to operate as a deterrent, not only to respondents but to all others as well to prevent the flow of products in the state which are dangerous to the public health, safety and welfare of its citizens.

Also, the holding by the Court of Appeals that out-of-state causes of action against the identical foreign corporation brought by plaintiffs who are neither residents nor citizens of South Carolina may not be maintained because it violates due process, where if brought by residents or citizens may be maintained without violating due process, is in direct conflict with the holding by this Court in *First National Bank of Chicago v. United Airlines*, 342 U. S. 396 (1952) that where some out-of-state causes of action may be tried in a state there is no reason for refusal to permit others to be tried, and the refusal to do so constitutes a violation of the Full Faith and Credit Clause of the United States Constitution (Article IV, section 1); and, as applied to citizens of sister states, the holding of the Court of Appeals violates the Privileges and Immunities clause of the United States Constitution (Article IV, section 2).

The allowance of the petition in this case would afford the Court the opportunity to review and resolve the prob-

lems involved herein on an important jurisdictional due process question of federal law and appellate review, and would be conducive to the fair and uniform administration of justice.

2. **The Court of Appeals has decided an important question of federal law of nationwide concern which has not been, but should be, settled by this Court:** This Court, in its decision of *International Shoe, supra,* and *Perkins v. Benquet, supra,* expanding the older concepts of amenability of foreign corporations to suits in a state with which they have contacts, looked only to the degree of activities and contacts of the corporate defendants in determining whether due process was satisfied; and did not consider as a factor the residency or citizenship of the plaintiffs. The Court below, however, in reversing the order of the District Judge departed from the test laid down by this Court in determining due process, and applied a new and different test in reaching its decision. It made a distinction between plaintiffs who are residents or citizens of the forum state and those who are neither residents nor citizens, on identical causes of actions against identical foreign corporations. It placed substantial reliance upon "the lack of attachment" of the petitioners to the forum, such as residency or citizenship in holding that the maintenance of the actions would violate due process. It did not state that due process would be violated by the maintenance of actions against foreign corporations by **all** plaintiffs. Rather, it would violate due process only if brought by **plaintiffs** who have no attachment to the forum, either as residents or citizens and that a resident or citizen of the state would be free to maintain the identical actions brought here without violating due process, and thus placed an uneven hand on plaintiffs who are neither residents nor citizens of the

forum state as compared to those who are residents or citizens of such state."

The true effect of the holding by the Court below would be to defeat the fundamental purpose for the grant of diversity jurisdiction under Article III, Section 2 of the United States Constitution to avoid discrimination against non-residents and would be in direct conflict with the federal principle that a non-resident resorting to the federal diversity jurisdiction should be accorded the same rights that a resident litigant would receive.

Hanna v. Plumer Extr., 380 U. S. 460, 467 (1965);
Guaranty Trust Co. of New York v. New York, 326 U. S. 99, 111 (1945);
Erie R. R. v. Tompkins, 304 U. S. 64, 74 (1938);
Martin v. Hunter's Lessee, 14 U. S. (1 Wheat,) 304, 347 (1816);
Bank of United States v. Deveaux, 9 U. S. (5 Cranch) 61, 87 (1809);
Szantay v. Beech Aircraft Corp., 349 F. (2d) 60, 65 (C. A. 4, 1964;
Markham v. City of Newport News, 292 F. (2d) 711, 718 (C. A. 4, 1961).

Also, the Court below, in reversing the District Judge, points out in its opinion as a factor for its decision that plaintiffs selected South Carolina as the forum "for the sole purpose of availing themselves of the relatively long statute of limitations—the limitation periods having run in all other states having any connection with the claims presented." To permit the decision of the Court below to stand because of this factor would operate to deprive a plaintiff of the substantial right to select a forum granted under the provisions of 28 U. S. C. A., section 1391 (a) and (c) and retain the state law advantages of the forum in which such plaintiff initially brings the action, subject to transfer under 28 U. S. C. A., section 1404(a), and would thus be in violation of the principles enunciated by this

Court in *Van Dusen v. Barrack,* 376 U. S. 641 (1964). It would also operate to permit a federal court to refuse to apply the law of the state in which it is sitting, including its conflict of law rules, in direct violation of the mandate of *Erie RR. v. Tompkins, supra,* and *Klaxon v. Stentor Electric Co., Inc.,* 313 U. S. 487 (1941) that a federal court is bound to apply the law of the state in which it sits, which includes its conflict of law rules.

Nor can the factor of "relative convenience" serve as a basis for dismissal of the actions because this factor is no longer of overriding importance since the passage by Congress of 28 U. S. C. A 1404(a) providing for the transfer of cases for convenience of witnesses, in the interest of justice, 2 Moore's Federal Practice (2d), Section 4.25(5) p. 1172, particularly where the activity within the state is regular, continuous and systematic, such as is the factual situation here.

The decision of the Court below and that of the First Circuit in *Seymour v. Parke, Davis & Co.,* 423 F. (2d) 584 (1970) upon which the Court below relied, are not only in direct conflict with well established principles of federal law as enunciated in *Erie, Byrd, Hanna, Van Dusen, Klaxon* and *Szantay,* but clearly violate the right of petitioners, who are neither residents nor citizens of the forum state, under the Privileges and Immunities, Due Process and Equal Protection clauses, to select the forum to bring their actions for the redress of wrongs committed by the corporate respondents, where plaintiffs who are residents or citizens of the forum state would be free to select the identical forum to bring the identical actions. Certainly, when the corporate respondents undertook to carry on its activities in South Carolina, they did so with the knowledge that they would be subject to the jurisdiction of the Courts in South Carolina, including its laws, and, therefore, should not now be permitted to escape its jurisdiction because

the plaintiffs are non-residents and non-citizens of South Carolina or because South Carolina has a longer Statute of Limitations than the other states where the defendants might be doing business and the actions might also have been brought.

The issue raised under this heading involves an important federal jurisdictional due process question of nationwide concern decided by the Court of Appeals which has not been, but should be, settled by this Court.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a Writ of Certiorari, should reverse the judgment of the Court below and should affirm the order of the District Judge that the respondents are amenable to jurisdiction in South Carolina.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

COLUMBIA DIVISION

Civil Action No. 69-446

ANNIE MELL RATLIFF AND HENRY RATLIFF,
PLAINTIFFS,

versus

COOPER LABORATORIES, INC., DEFENDANT

ORDER

This action was brought by plaintiff who is a citizen and resident of the state of Florida, and the cause of action arose in that state. The defendant is a Delaware corporation whose business in South Carolina involves the solicitation and promotion of sales and distribution of its products in the state. South Carolina has had no contact with the subject matter of this action.

At the time this action was commenced, each count of the action would have been barred by the Statute of Limitations of the state where the causes of action arose. This action would not be barred under the South Carolina Statute of Limitations, however, if that statute is applicable.

Defendant has moved to set aside service and dismiss the complaint on several grounds. The first is that this Court lacks jurisdiction because the defendant is not licensed to do business and is not doing business in the state of South Carolina; and second, that this Court lacks jurisdiction because of South Carolina's "door closing" statute, Section 10-214, South Carolina Code of Laws, 1962. It is also asserted that the venue is improper, that the Statute of Limitations of the place where the cause of action arose would be applicable, and would constitute a bar to the action, and the application of the South Carolina Statute of Limitations would be unconstitutional.

Section 10-214, Code of Laws of South Carolina, 1962, provides that:

> "An action against a corporation created by or under the laws of any other state, government or country may be brought in the circuit court: (1) by any resident of this state for any cause of action; or (2) By a plaintiff not a resident of this state when the cause of action shall have arisen or the subject of the action shall be situated within this state."

Under this statute, the South Carolina state courts do not have jurisdiction in an action brought by a non-resident against a foreign corporation in a foreign cause of action. The question is whether the South Carolina statute should be applied so as to restrict jurisdiction of the federal courts in South Carolina in diversity cases.

In *Szantay v. S. Beech Aircraft Corp.*, 349 F. (2d) 60 (C. A. 4, 1964), the Court in discussing the "Erie-Guaranty Trust-Byrd" Doctrine applied the following analysis in resolving a federal-state conflict in a diversity case:

> "1. If the state provision, whether legislatively adopted or judicially declared, is the substantive right or obligation at issue, it is constitutionally controlling.
>
> "2. If the state provision is a procedure intimately bound up with the state right or obligation, it is likewise constitutionally controlling.
>
> "3. If the state procedural provision is not intimately bound up with the right being enforced but its application would substantially affect the outcome of the litigation, the federal diversity court must still apply it unless there are affirmative countervailing federal considerations. This is not deemed a constitutional requirement but one dictated by comity."

The South Carolina "door closing" statute is procedural and its application would substantially affect the outcome of the litigation in the instant case. The question for determination, therefore, is whether there are affirmative countervailing considerations which would prevent this Court from applying the statute in this diversity case. The Court determines that there are such affirmative countervailing considerations, and the statute is therefore inapplicable.

The application of the statute would result in discrimination against non-residents. Had the plaintiff in this case been a resident of South Carolina she could have sued in the state courts. The plaintiff, however, being a non-resident, is prohibited by statute from suing in the state courts. In discussing countervailing federal considerations in *Szantay, supra,* at page 65, the Court stated:

> "The most fundamental is that expressed in the constitutional extension of subject matter jurisdiction to the federal courts in suits between citizens of different states. U. S. Const. Art. III, Section 2. The purpose of this jurisdictional grant was to avoid discrimination against non-residents . . . The South Carolina 'door closing' statute permits its residents to sue foreign corporations on foreign causes of action yet denies this privilege to non-residents."

The Court quotes Judge Haynsworth in *Markham v. City of Newport News,* 292 F. (2d) 711, 718 (C. A. 4, 1961):

> "[a] non-resident litigant in resorting to the federal diversity jurisdiction should obtain the same relief a resident litigant would receive in the state courts."

Defendant asserts that to grant jurisdiction in the instant case would permit forum shopping. The federal policy against forum shopping as set forth in *Erie v. Tompkins,* 304 U. S. 64, 585 Ct. 817, 82 L. Ed. 1188 (1938), however, applies to forum shopping as between federal and state courts sitting in the same state, and not as between federal courts sitting in different states. As stated in *Van Dusen v. Barrack,* 376 U. S. 612, 84 S. Ct. 805 (1964):

> "Of course these cases allow plaintiffs to retain whatever advantages may flow from the state laws of the forum they have initially selected. There is nothing, however, in the language or policy of Sec. 1040(a) to justify its use by defendants to defeat the advantages accruing to plaintiffs who have chosen a forum which, although it was inconvenient, was a proper venue. In this regard the transfer provisions of Sec. 1404(a) may be compared with those of Sec. 1406(a). Although both sections were broadly designed to allow

transfer instead of dismissal, Sec. 1406(a) provides for transfer from forums in which venue is wrongly or improperly laid, whereas, in contrast, Sec. 1404(a) operates on the premises that the plaintiff has properly exercised his venue privileges. This distinction underlines the fact that Congress, in passing Sec. 1404(a), was primarily concerned with the problems arising where, despite the propriety of the plaintiff's venue selection, the chosen forum was an inconvenient one.

"In considering the Judicial Code, Congress was particularly aware of the need for provisions to mitigate abuses stemming from broad federal venue provisions. The venue provision of the Federal Employer's Liability Act was the subject of special concern. However, while the Judicial Code was pending, Congress considered and rejected the Jennings bill which, as the Court stated in *Ex Parte Collett*, 337 U. S. 55, 64, 69 S. Ct. 944, 949, 93 L. Ed. 1207, was far more drastic than Section 1404(a), and 'would in large part have repealed (the venue section) of the Liability Act' by severely delimiting the permissable forums. This legislative background supports the view that Sec. 1404(a) was not designed to narrow the plaintiff's venue privilege or to defeat the state-law advantages that might accrue from the exercise of this venue privilege but rather the provision was simply to counteract the inconvenience that flowed from the venue statutes by permitting transfer to a convenient federal court."

As pointed out in *Szantay, supra,* this case is not controlled by *Angel v. Bullington,* 330 U. S. 183, 67 S. Ct. 657, 91 L. Ed. 832 (1947); *Woods v. Interstate Realty Co.,* 337 U. S. 535, 69 S. Ct. 1239, 93 L. Ed. 1524 (1949). Neither of these cases involve discrimination against non-residents.

In the absence of South Carolina's "door closing" statute, there is no question but that the federal court would have jurisdiction in South Carolina. The Court has determined that the statute is not applicable, and venue is proper. *Papciak v. Richardson-Merrill, Inc.,* C/S No. 67-219, interlocutory appeal denied (1968) and petition for re-

hearing denied, United States Court of Appeals for the Fourth Circuit Misc. No. 500 (1968). At the hearing of the motions, defendant indicated that it may desire to move for a change of venue for the convenience of parties and witnesses, and in the interest of justice; and the Court will grant such a motion pursuant to the provisions of 28 USCA 1404(a), if made, within ten (10) days from the entry of this Order.

Having selected South Carolina as the forum for bringing the action, plaintiff is entitled to whatever benefits may flow from the laws of this state. Under South Carolina law, the law of the forum governs the statute of limitations to be applied. Accordingly, in changing the venue, the South Carolina Statute of Limitations should apply. *Van Dusen v. Barrack, supra.*

IT IS ORDERED that defendant's motions to set aside service of summons and to dismiss the complaint are denied; however, the Court is of the opinion that this Order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the Order may materially advance the ultimate termination of the litigation, therefore, an interlocutory appeal pursuant to 28 USCA § 1292(b) may be taken from this Order, if application is made within ten (10) days after entry of this Order; and said application shall stay the proceedings in this Court if made; and

IT IS FURTHER ORDERED that should the defendant renew its motion to change the venue within ten (10) days from entry of this Order, the venue may be changed to a more convenient forum subject to the application of the South Carolina Statute of Limitations.

ROBERT MARTIN, JR.,
United States District Judge.

Columbia, S. C.
April 14, 1970

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Civil Action No. 69-1048

ALICE W. NICHOLS, PLAINTIFF,

versus

STERLING DRUG COMPANY, INC., A CORPORATION,
DEFENDANT

ORDER

This action was brought by plaintiff, a citizen and resident of the state of Indiana, and the cause of action arose without this state. The defendant is a Delaware corporation authorized to do business in South Carolina and is engaged in the business of soliciting and selling drugs and medicines in South Carolina; and has designated an agent for service of process in this state. South Carolina has had no contact with the subject matter of this action.

At the time this action was commenced, each count of the action would have been barred by the Statute of Limitations of the state where the cause of action arose. The action would not be barred under the South Carolina Statute of limitations, however, if that statute is applicable.

The defendant has moved to set aside service and dismiss the complaint on several grounds. The first is that this Court lacks jurisdiction because there are no local interests involved in this action, and to subject the defendant to this suit would violate the due process clause to the Fourteenth Amendment of the United States Constitution; second, that the laws of South Carolina would not allow a non-resident plaintiff to sue a foreign corporation in South Carolina on a foreign cause of action under the "door closing" statute of South Carolina, Section 10-214, South Carolina Code of Laws, 1962. It is also asserted that the law of the place where the cause of action arose would be applicable and would constitute a bar to this action, and the application of the South Carolina Statute of Limitations would be unconstitutional.

Defendant is authorized to do and is doing business in South Carolina and is therefore amenable to the jurisdiction of this Court unless Section 10-214, Code of Laws of South Carolina, 1962, is applicable. This section provides that:

> "An action against a corporation created by or under the laws of any other state, government or country may be brought in the circuit court, (1) By any resident of this State for any cause of action; or (2) By a plaintiff not a resident of this State when the cause of action shall have arisen or the subject of the action shall be situated within this State."

Thus, the South Carolina State Courts do not have jurisdiction over a suit brought by a non-resident against a foreign corporation on a foreign cause of action. The question is whether the South Carolina Statute should be applied so as to restrict the jurisdiction of the federal courts in South Carolina in diversity cases.

In *Szantay v. S. Beech Aircraft Corp.*, 349 F. (2d) 60 (C. A. 4, 1964), the Court in discussing the "Erie-Guaranty Trust-Byrd" Doctrine applied the following analysis in resolving a federal-state conflict in a diversity case:

> "1. If the state provision, whether legislatively adopted or judicially declared, is the substantive right or obligation at issue, it is constitutionally controlling.
>
> "2. If the state provision is a procedure intimately bound up with the state right or obligation, it is likewise constitutionally controlling.
>
> "3. If the state procedural provision is not intimately bound up with the right being enforced but its application would substantially affect the outcome of the litigation, the federal diversity court must still apply it unless there are affirmative countervailing federal considerations. This is not deemed a constitutional requirement but one dictated by comity."

The South Carolina "door closing" statute is procedural and its application would substantially affect the outcome of the litigation in the instant case. The question for determination, therefore, is whether there are affirmative countervailing considerations which would prevent this

Court from applying the statute in this diversity case. The Court determines that there are such affirmative countervailing considerations and that the statute is therefore inapplicable.

The application of the statute would result in discrimination against non-residents. Had the plaintiff in this case been a resident of South Carolina, she could have sued in the state courts. The plaintiff, however, being a non-resident, is prohibited by statute from suing in the state courts. In discussing countervailing federal considerations in *Szantay supra*, at page 65, the Court stated:

> "The most fundamental is that expressed in the constitutional extension of subject matter jurisdiction to the federal courts in suits between citizens of different states. U. S. Const. Art. III, Sec. 2. The purpose of this jurisdictional grant was to avoid discrimination against non-residents . . . The South Carolina "door closing" statute permits its residents to sue foreign corporations on foreign causes of action yet denies this privilege to non-residents."

The Court quotes Judge Haynsworth in *Markham v. City of Newport News*, 292 F. (2d) 711, 718 (C. A. 4, 1961):

> "[a] non-resident litigant in resorting to the federal diversity jurisdiction should obtain the same relief a resident litigant would receive in the state courts."

Defendant asserts that to grant jurisdiction in the instant case would permit forum shopping. The federal policy against forum shopping as set forth in *Erie v. Tompkins*, 304 U. S. 64, 585 Ct. 817, 82 L. Ed. 1188 (1938), however, applies to forum shopping as between a federal and state court sitting in the same state, and not as between federal courts sitting in different states. As stated in *Van Dusen v. Barrack*, 376 U. S. 612, 84 S. Ct. 805 (1964):

> "Of course these cases allow plaintiffs to retain whatever advantages may flow from the state laws of the forum they have initially selected. There is nothing, however, in the language or policy of Sec. 1404(a) to justify its use by defendants to defeat the advantages accruing to plaintiffs who have chosen a forum

which, although it was inconvenient, was a proper venue. In this regard the transfer provisions of Sec. 1404(a) may be compared with those of Sec. 1406(a). Although both sections were broadly designed to allow transfer instead of dismissal, Sec. 1406(a) provides for transfer from forums in which venue is wrongly or improperly laid, whereas, in contrast, Sec. 1404(a) operates on the premises that the plaintiff has properly exercised his venue privilege. This distinction underlines the fact that Congress, in passing Sec. 1404(a), was primarily concerned with the problems arising where, despite the properiety of the plaintiff's venue selection, the chosen forum was an inconvenient one.

"In considering the Judicial Code, Congress was particularly aware of the need for provisions to mitigate abuses stemming from broad federal venue provisions. The venue provision of the Federal Employer's Liability Act was the subject of special concern. However, while the Judicial Code was pending, Congress considered and rejected the Jennings bill which, as the Court stated in *Ex Parte Collett,* 337 U. S. 55, 64; 69 S. Ct. 944, 949; 93 L. Ed. 1207, was far more drastic than Sec. 1404(a), and 'would in large part have repealed (the venue section) of the Liability Act' by severely delimiting the permissable forums. This legislative background supports the view that Sec. 1404(a) was not designed to narrow the plaintiff's venue privilege or to defeat the State-law advantages that might accrue from the exercise of this venue privilege but rather the provision was simply to counteract the inconviences that flowed from the venue statutes by permitting transfer to a convenient federal court."

As pointed out in *Szantay, supra,* this case is not controlled by *Angel v. Bullington,* 330 U. S. 183, 67 S. Ct. 657, 91 L. Ed. 832 (1947); *Woods v. Interstate Realty Co.,* 337 U. S. 535, 69 S. Ct. 1239, 93 L. Ed. 1524 (1949). Neither of these cases involve discrimination against non-residents.

In the absence of South Carolina's "door closing" statute, there is no question but that the federal court

would have jurisdiction in South Carolina. The Court has determined that the statute is not applicable and venue is proper. *Papciak v. Richardson-Merrill, Inc.*, C/A No. 67-219, interlocutory appeal denied (1968), and petition for rehearing denied, United States Court of Appeals for the Fourth Circuit, Misc. No. 500 (1968). At the hearing of the motions, defendant indicated that it may desire to move for a change of venue for the convenience of parties and witnesses, and in the interests of justice; and the court will grant such a motion pursuant to the provisions of 28 USCA 1404(a), if made, within ten (10) days from entry of this Order.

Having selected South Carolina as the forum for bringing this action, plaintiff is entitled to whatever benefits may flow from the laws of this state. Under South Carolina law, the law of the forum governs the statute of limitations to be applied. Accordingly, if the venue should be changed to the state where the cause of action arose, the South Carolina Statute of Limitations should apply. *Van Dusen v. Barrack, supra.*

IT IS ORDERED that defendant's motions to quash the service of summons and to dismiss the action be and the same is hereby denied; however, the Court is of the opinion that this Order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the Order may materially advance the ultimate termination of the litigation, therefore, an interlocutory appeal pursuant to 28 USCA § 1292(b) may be taken from this Order, if application is made to it within ten (10) days after entry of this Order; and said application shall stay the proceedings in this Court if made; and

IT IS FURTHER ORDERED that should the defendant move for a change of venue within ten (10) days from entry of this Order, the venue may be changed to a more convenient forum, subject to the application of the South Carolina Statute of Limitations.

J. ROBERT MARTIN, JR.,
United States District Judge.

Columbia, S. C.
April 21, 1970

United States Court of Appeals

FOURTH CIRCUIT

No. 14,788

ANNIE NELL RATLIFF and HENRY RATLIFF,
APPELLEES,

versus

COOPER LABORATORIES, INC., APPELLANT

No. 14,789

ALICE W. NICHOLS, APPELLEE,

versus

STERLING DRUG COMPANY, A CORPORATION, APPELLANT

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA, AT COLUMBIA. J. ROBERT MARTIN, JR., DISTRICT JUDGE

(Argued February 4, 1971. Decided June 29, 1971.)

Before WINTER and CRAVEN, Circuit Judges, and MILLER, District Judge

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Julius W. McKay and E. W. Laney, III (McKay, McKay, Sherrill, Walker, and Wilkins; and Turner, Padget, Graham and Laney on brief), for Appellant in No. 14,788 and 14,789, and Henry Hammer for Appellees in No. 14,788 and 14,789.

CRAVEN, Circuit Judge:

This is a consolidated interlocutory appeal, 29 U. S. C. § 1292(b), by two drug manufacturing companies, Cooper Laboratories, Inc. and Sterling Drug Company, Inc., who challenge the jurisdiction of the District Court of South Carolina to adjudicate certain claims brought by nonresidents and arising outside the state. The district court denied the motions of the defendant drug companies to set aside the service of summons and to dismiss the complaint. We think the facts presented as a basis for in personam jurisdiction are insufficient "contacts, ties, or relations"[1] to satisfy the due process clause of the Fourteenth Amendment, and therefore reverse.

These are diversity jurisdiction cases with the requisite jurisdictional amount. Both claims stem from alleged injuries suffered from the consumption of drugs manufactured by defendants. The drugs were neither manufactured nor consumed in South Carolina.

Plaintiffs Annie and Henry Ratliff are citizens and residents of Florida. She purchased the allegedly harmful drugs in Florida and apparently consumed them there, but, in any event, did not use them in South Carolina. Defendant Cooper Laboratories, the maker of the drug used by Mrs. Ratliff, is a Delaware corporation with its principal place of business in Mystic, Connecticut. Its activities in South Carolina are limited to solicitation by mail to dealers and wholesalers, and the mailing of promotional literature to approximately 650 doctors on its mailing lists.

Plaintiff Alice W. Nichols is a citizen and resident of Indiana, and it has been stipulated that "the drugs referred to in the Complaint were purchased, consumed and ingested in Indiana and the injuries and damages complained of occurred in Indiana" and that "the treatment and hospitalization referred to in the Complaint occurred in Indiana." Defendant Sterling Drug, a Delaware corporation, maintains its principal place of business in New York where it manufactured the drug taken by plaintiff Nichols. Sterling Drug's activities in South Carolina, however, are more

[1] *International Shoe Co. v. Washington*, 326 U. S. 310, 319 (1945).

extensive than those of Cooper Laboratories. It has filed application and been given authority to do business in South Carolina and has appointed an agent for service of process. South Carolina Code of Laws 12-23.1 through 12-23.16. Additionally, Sterling maintains five "detail men" who live in South Carolina and promote Sterling's products through personal contacts with doctors and drugstores throughout the state. Although occasionally taking orders themselves, it was stipulated that "their primary responsibility is the promotion of drugs, not the actual sale of them."

Plaintiffs' only interest in South Carolina is in its relatively long statute of limitations (six years), and plaintiffs' only contact with South Carolina is the bringing of these lawsuits for the sole purpose of availing themselves of that statute—the limitation periods having run in all other states having any connection with the claims presented—Florida, Indiana, New York, Connecticut, and Delaware.

Process was served on Cooper Laboratories pursuant to the procedures of South Carolina's long-arm statute, South Carolina Code of Laws 12-23.14, and upon Sterling's agent appointed for service of process in South Carolina under 12-23.13. [2] The sufficiency of service is not questioned here. However, "underlying the question of service of process is the preliminary inquiry into whether the court has the power to summon a defendant before it to adjudicate a claim against him." 4 Wright & Miller, Federal Practice and Procedure 205 (1969).

Whether jurisdiction in the sense of power exists depends upon concepts of "fairness" and "convenience" and not upon mere compliance with procedural requirements of notice, nor even corporate "presence" within the state. *International Shoe Co. v. Washington,* 326 U. S. 310 (1945).

> It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative. The test is not merely, as has sometimes been sug-

[2] See Rule 4(e) Fed. R. Civ. P.

> gested, whether the activity, which the corporation has seen fit to procure through its agents in another state, is a little more or a little less . . . Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. That clause does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations . . . *Id.* at 319.

South Carolina has extended its service of process laws to the outer limits allowed by *International Shoe*. See *Shealy v. Challenger Manufacturing Co.*, 304 F. (2d) 102, 107 (4th Cir. 1962); *Carolina Boat & Plastic Co. v. Glascoat Distributors, Inc.*, 249 S. C. 49, 152 S. E. (2d) 352 (1967). Our inquiry is therefore limited to a determination of whether the facts in the instant case fall within those notions of due process,[3] *i. e.*, fairness and convenience, which would make it not unreasonable to require the defendant corporations to litigate far from home. Are the activities of the defendant drug companies extensive enough

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[3] "Despite the rather obvious point that the fifth, rather than the fourteenth, amendment should be the source of due process limitation upon the exercise of federal court powers, it has generally been assumed that the incorporation of state law to confer district court amenability embraces state law as limited by federal restraints on the states themselves. . . ." Foster, *Long-Arm Jurisdiction in Federal Courts*, 1969 Wis. L. Rev. 9, 38.

"The oft-repeated test is that first stated in *Pulson v. American Rolling Mill Co.*, 170 F. (2d) 193, 194 (1st Cir. 1948):

> 'There are two parts to the question whether a foreign corporation can be held subject to suit within a state. The first is a question of state law: has the state provided for bringing the foreign corporation into its courts under the circumstances of the case presented? There is nothing to compel a state to exercise jurisdiction over a foreign corporation unless it chooses to do so, and the extent to which it so chooses is a matter for the law of the state as made by its legislature. If the state has purported to exercise jurisdiction over the foreign corporation, then the question may arise whether such attempt violates the due process clause or the interstate commerce clause of the federal constitution. U. S. Const. art. 1, § 8, cl. 3; amend. 14. This is a federal question and, of course, the state authorities are not controlling. But it is a question which is not reached for decision until it is found that the State statute is broad enough to assert jurisdiction over the defendant in a particular situation.'" *Id.* at 38-39, n. 112.

in South Carolina to warrant in personam jurisdiction when the plaintiffs are non-residents and the causes of action arose outside the forum and were unconnected with the defendant's activities in South Carolina? The question has been said to be one of *amenability,* Foster, *Long-Arm Jurisdiction in Federal Courts,* 1969 Wis. L. Rev. 9, 11, and the ultimate process one of balancing. *Developments in the Law of State-Court Jurisdiction,* 73 Harv. L. Rev. 909, 924 (1960); see generally Wright & Miller, *supra,* at 261-62. Expanding interstate commerce and the "transformation of our national economy over the years" has tended to expand jurisdiction, *McGee v. International Life Insurance Co.,* 355 U. S. 220, 222 (1957), but there are still limits.

> But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. . . . Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations of the power of the respective States. *Hanson v. Denckla,* 357 U. S. 235, 251 (1958).

Significant in the instant factual setting is the lack of a "rational nexus" between the forum state and the relevant facts surrounding the claims presented. *Curtis Publishing Co. v. Birdsong,* 360 F. (2d) 344, 346 (5th Cir. 1966). See also, *Blount v. Peerless Chemicals (P.R.), Inc.,* 316 F. (2d) 695 (2d Cir. 1963); *Elliott v. Edwards Engineering Corp.,* 257 F. Supp. 537, 539 (D. Col. 1965). If "plaintiff's injury does not arise out of something done in the forum state, then other contacts between the corporation and the state must be *fairly extensive* before the burden of defending a suit there may be imposed upon it without offending 'traditional notions of fair play and substantial justice.'" F. James, Civil Procedure 640 (1965). (Emphasis added.) See *Hanson v. Denckla, supra,* at 251; *Perkins v. Benquet Consolidated Mining Co.,* 342 U. S. 437 (1952); *Volkswagen Interamericana, S. A. v. Rohlsen,* 360 F. (2d) 437 (1st Cir. 1966); von Mehren and Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis,* 79 Harv. L. Rev. 1121, 1137-38, 1142-44 (1966).

Here the activities of the defendant corporations in South Carolina, although possibly sufficient to constitute "presence", are nonetheless minimal. Neither maintains an office in South Carolina, and neither warehouses goods there. With the exception of the samples and materials used by Sterling's detail men, neither has any real or personal property in the state. Nor does either maintain a bank account in the state or advertise in directories there (although advertisements do appear in national medical journals which subsequently find their way into the state). The presence of Sterling's detail men in South Carolina and the appointment of an agent for service of process in accordance with South Carolina law does not, we think, tip the scale for plaintiff Nichols. We think the application to do business and the appointment of an agent for service to fulfill a state law requirement is of no special weight in the present context. Applying for the privilege of doing business is one thing, but the actual exercise of that privilege is quite another. See *International Shoe Co. v. Washington, supra*, at 319. The principles of due process require a firmer foundation than mere compliance with state domestication statutes.

In respect to the remaining activities of both defendants, and in particular the activities of Sterling's detail men, we subscribe to the position taken by the First Circuit in *Seymour v. Parke, Davis & Co.*, 423 F. (2d) 584 (1st Cir. 1970), a case of remarkable similarity to the one before us. In *Seymour*, a resident of Massachusetts purchased an allegedly injury-producing drug manufactured by Parke, Davis & Company, a Michigan corporation. None of the events giving rise to the claims presented occurred in the forum state, New Hampshire, where the plaintiff admitted she brought suit because of the expiration of the statute of limitations in Massachusetts. The district court dismissed the claim for lack of in personam jurisdiction. Affirming, the court of appeals concluded:

> If the plaintiff has some attachment to the forum, or if the defendant has adopted the state as one of its major places of business, we would have no question of the right of the state to subject the defendant to suit

> for unconnected causes of action. Nor would we even if the forum were not a major center of defendant's business but were nevertheless a community into whose business life the defendant had significantly entered as determined by the quality, substantiality, continuity, and systematic nature of its activities . . . . When, however, defendant's only activities consist of advertising and *employing salesmen to solicit orders,* we think that fairness will not permit a state to assume jurisdiction. 423 F. (2d) at 587. (Emphasis added.)

Since neither defendant here was amenable to in personam jurisdiction in South Carolina, the motions to set aside the service of process and to dismiss the complaint should have been granted.

Because we hold the district court lacked jurisdiction, we do not reach the defendant corporations' second line of defense—that South Carolina's "door-closing" statute (South Carolina Code of Laws 10-214) prevents these nonresident plaintiffs from maintaining suits on causes of action not arising within the state. Compare *Arrowsmith v. United Press International,* 320 F. (2d) 219 (2d Cir. 1963), with *Szantay v. Beech Aircraft Corp.,* 349 F. (2d) 60 (4th Cir. 1965), which additionally involved a domestic corporate defendant.

REVERSED.